

Filed for intro on 01/31/2002  
SENATE BILL 2984 By  
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HOUSE BILL 3047  
By Head

AN ACT to amend Tennessee Code Annotated, Title 65, Chapter 21, Part 1, relative to utilities.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 65-21-105, is amended by deleting the section in its entirety and by substituting instead the following:

Section 65-21-105.

(a)

(1) The general assembly finds that utilities, as such term is defined in this section, have dedicated a portion of poles, ducts, conduits and rights-of-way to communications companies for pole attachments, through a course of conduct over many years, and it declares that it is in the public interest for these public utilities to continue to make available such poles, ducts, conduits and rights-of-way for pole attachment at reasonable rates, terms and conditions.

(2) The general assembly finds that utilities, as such term is defined in this section, operate their facilities, provide services, and impose charges for such services for the sole purposes of making such services available to their

customers, recouping their costs for doing so, and maintaining modest income reserves for financial security and support during emergencies. Such utilities are not in operation to generate revenue for profit-making purposes.

(3) The general assembly finds that reasonable and nondiscriminatory access to utility poles is an integral aspect of the communications business.

(b) As used in this section, unless the context otherwise requires:

(1) "Utility" means any electric plant or electric system which is municipally owned and operated pursuant to §7-52-103 or any other public or private act, or the provisions of the charter of a municipality, county or metropolitan government, and any rural electric cooperative doing business pursuant to the authority governed by Title 65, Chapter 25 or Title 48, Chapter 53. This act does not apply to any pole attachment regulated by the Federal Communications Commission under §224 of the Communications Act of 1934, as amended.

(2) "Pole attachment" means any attachment by a communications company to a pole, duct, conduit, or right-of-way owned, including jointly owned, or controlled by a utility.

(3) "Useable space" means the total distance between the top of a utility pole and the lowest possible attachment point that provides the minimum allowable grade clearance, including the space which separates communications and power lines. The total useable space on a pole occupied by a pole attachment shall be presumed to be thirteen and one-half feet (13½'); provided that a utility or communications company may rebut the presumption with statistically reliable measurements of the total useable space on the public utility's poles which bear pole attachments in the relevant service area.

(4) "Communications company" means any individual or entity that offers or provides, or intends to offer or provide, any telephone service, telegraph service, paging service, internet access service, cable television service, including any broadband cable communications services, or any other service similar to such services, including the transport or delivery of services between or to communications companies or end users customers.

(c)

(1) All rates, terms and conditions for pole attachments shall be reasonable, including, but not limited to, any terms concerning audits, inspection, termination, performance and/or security bond requirements, force majeure, payment of administrative expenses, and utility disclaimers regarding the condition of the pole.

(2) A rate is reasonable if it assures a utility the recovery of not less than its additional cost of providing pole attachments, nor more than a one-time reimbursement for reasonable costs actually incurred by the utility for necessary rearrangements and replacements performed at the request of a communications company and an annual recurring fee for each pole, duct, conduit or right-of-way used by a pole attachment determined by multiplying the percentage of the total useable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment, by the actual annual costs of ownership for the entire pole, duct, conduit, or rights-of-way. The percentage of total useable space on a pole occupied by the pole attachment shall be presumed to be seven and four tenths percent (7.4%) [one foot (1') occupied by the pole attachment divided by thirteen and one-half feet (13½') total useable space]. Actual annual costs of ownership means the sum of the average annual capital costs of all

similar poles, ducts, conduits or rights-of-way [exclusive of crossarms and other property and equipment not necessary for pole attachments] owned by the utility, and the average annual actual operating costs for such poles, ducts, conduits or rights-of-way. Operating costs comprise expenses of maintenance; depreciation; administration; and taxes. Annual capital costs are historical capital costs less depreciation.

(3) Each entity who requests to attach to or adjust existing pole attachments to a utility's poles, shall be held responsible for only those costs actually incurred by the utility or any other licensee having pole attachments on such poles or using space within such conduit to accommodate the requesting party's initial pole attachment or adjustment thereto. In the event such initial pole attachment or adjustment request necessitates replacement of the affected pole, the requesting party shall be held responsible only for the costs attributable to the necessary relocation and/or rearrangement of the utility's and existing licensees' facilities to the replacement pole and the incremental additional cost of the new pole necessary to accommodate the initial pole attachment or adjustment request that the utility would not otherwise have had to incur, less the salvage value of the pole replaced.

(d) No later than January 1, 2003, every utility shall provide communications companies currently having or seeking pole attachments, written documentation setting forth accurate and complete information relevant to the calculation of the utility's pole attachment rates, and shall make such prepared documentation available to any other person upon request. A utility shall not increase its rates more than once in any three (3) year period and then only after providing the communications companies currently having pole attachments with at least six (6) months advance written notice containing accurate and complete information relevant to the calculation of the proposed increased

rate, including rate increases resulting from an increase in the Gross National Producers Price Index (GNPPI). Such rate increases shall become effective on January 1 for the year following the calendar year in which the utility provided the respective communications companies with notice thereof.

(e) A utility shall provide a communications company with nondiscriminatory and competitively neutral access to any pole, duct, conduit or right-of-way owned or controlled by it.

(f) A communications company that obtains a pole attachment shall not be required to bear any of the costs of rearranging or replacing its pole attachment, if such rearrangement or replacement is required as a result of an additional pole attachment or the adjustment of an existing pole attachment sought by any other entity, including the owner of such pole, duct, conduit, or right-of-way.

(g) A utility shall provide a communications company no less than sixty (60) days written notice prior to removal of facilities or termination of any service to those facilities. The utility shall not remove the facilities of a communications company or terminate any service of a communications company unless a material breach of a rate, term or condition of a pole attachment agreement has occurred.

(h) All other terms and provisions of any agreement with utilities governing or affecting a communications company's pole attachments must be fair, reasonable, and consistent with the provisions of this section.

(i) Any party aggrieved by a violation of this section may bring a civil action in the Chancery Court of Davidson County, Tennessee. In addition to any other remedies available in law or equity, the court may grant temporary and permanent injunctive relief on such terms as it may deem reasonable to prevent or restrain violations of this section. The utility shall bear the burden of proof in any court proceeding.

(j) A utility shall not require any communications company having or seeking pole attachments, to dedicate any such communications company's current or future facilities or the capacity thereof to the utility or any other entity, as a condition to granting such communications company the right to make or maintain pole attachments.

(k) A utility shall not impose requirements or conditions upon overlapping activities of a communications company.

(l) A utility shall approve or deny in writing any pole attachment application no later than fourteen (14) business days after the receipt thereof. Any such denial shall include, in sufficient detail, the grounds therefor, not inconsistent with the provisions of this section.

(m) Any pole attachment invoices that a utility sends to a communications company must be itemized in sufficient detail to permit the communications company to ascertain the basis of the charges included therein, including the pole attachment rate, the number of poles, the number of pole attachments, and the number of new pole attachments. If the communications company, upon receipt of the itemized invoice determines a discrepancy, with a margin of error of plus or minus five percent (5%), the communications company may conduct an audit. If the findings of the audit are outside the margin of error, the utility shall reimburse the communications company for the cost of the audit and the difference between any amount paid and the amount owed, as determined by the audit.

(n) This act does not constitute certification, as defined by §224(C) of the Communications Act of 1934, as amended.

(o) For purposes of this section, any and all claims that may arise out of pole attachments covered hereunder can be brought at any time within that period specified by applicable state law.

(p) A utility shall not require any communications company having or seeking pole attachments, to indemnify or insure such utility or any other entity from or against any losses, damages, claims for damages, or other liability to the extent that such arises from the negligent or willful misconduct of the utility, its agents, employees, contractors, or licensees, as a condition to granting such communications company the right to make or maintain pole attachments.

(q) A utility shall not require any communications company having or seeking pole attachments to be subject to any unilateral changes to any operational procedures, practices, or rules incorporated in a pole attachment agreement without first being provided reasonable opportunity to review, accept, or decline to agree to such specific provisions, as a condition to granting such communications company the right to make or maintain pole attachments.

(r) Nothing in this act shall be construed to rescind, impair or affect any contracts in effect before the effective date of this act, and shall only apply to contracts entered into, or renewed on or after the effective date of this act.

(s) On the request of a communications company or association of communications companies, a utility shall provide, within thirty (30) days, accurate and complete responses to requests for information relevant to the calculation of its pole attachment rates.

SECTION 2. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 3. This act shall take effect upon becoming a law, the public welfare requiring it.